Supreme Court, U.S.
FILED
041321 MAR 29 2005
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

GREGORY TUCKER,

Petitioner,

v.

CITY OF RICHMOND, KENTUCKY; ANN DURHAM, Mayor, in her individual capacity; SAM MANLEY, in his individual capacity; KENNETH CALDWELL, in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEAN
Counsel of Record

LAW OFFICES OF MICHAEL DEAN
227 MAIN STREET
IRVINE, KY 40336
(606) 723-4000

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. In a First Amendment retaliation case brought under the Civil Rights Act, must the plaintiff prove that the officials' retaliatory and adverse action would have deterred a person of ordinary firmness from continuing to engage in the constitutionally protected conduct, an objective standard, or merely that the plaintiff himself was deterred, a subjective standard?

2. In an interlocutory appeal of the district court's order denying defendants' motion for summary judgment on qualified immunity grounds, may the Court of Appeals resolve disputed issues of fact and overturn the district court's determination that genuine issues of material fact exist?

PARTIES TO PROCEEDINGS

Petitioner is an individual citizen and resident of the City of Richmond, Kentucky.

Respondents include the City of Richmond, Kentucky, its former Mayor, Ann L. Durham, its former Police Chief Charles DeBord, and two former Assistant Police Chiefs, Kenneth Caldwell and Sam Manley.

TABLE OF CONTENTS

Questions Presented i

Parties to Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Statement of the Case 2

Reasons why the Writ should be Granted 5

1. Conflict Among the Circuits 6

2. Conflict with Supreme Court Decisions 8

Conclusion 12

Appendix 1a

TABLE OF AUTHORITIES

Bell v. Blatter, 175 F.3d 378 (6th Cir. 1999) 6

Carroll v. Pfeffer, 262 F.3d 847 (8th Cir. 2001) 6

Coady v. Steil, 187 F.3d 727 (7th Cir. 1999) 6

Colombo v. Connell, 310 F.3d 115 (2d Cir. 2002)

Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998) . 7

Curley v. Town of Suffern, 268 F.3d 65 (2d Cir. 2001) 7

Davis v. Goord, 320 F.3d 346 (2d Cir. 2003), *superseded by* 2003 U.S. App. LEXIS 13030 (2d Cir. Feb. 10, 2003) 7

Eden v. Kennedy, 03-2108, 2004.C04.0001935 (4th Cir. 2004) 7

Frisby v. Schultz, 487 U.S. 474 (1988) 3

Gill v. Pidlypchak, 03-0232, 2004.C02.0001249 (2d Cir. 2004) 7

Hustler Magazine v. Jerry Falwell, 485 U.S. 46 (1988) . 10

Izen v. Catalina, 382 F.3d 566 (5th Cir. 2004) 6

Johnson v. Jones, 515 U.S. 304 (1995) 5, 8

Keenan v. Tejeda, 290 F.3d 252 (5th Cir. 2002) 6

Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283 (9th Cir. 1999) 6

Mimics v. Village of Angel Fire No. 03-2214 (10th Cir. 2005) 6

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5, 8, 9

Spear v. Town of West Hartford, 954 F.2d 63 (2d Cir. 1992) 7

Suarez Corp. Industries v. McGraw, 202 F.3d 676 (4th Cir. 2000) 7

Sullivan v. Carrick, 888 F.2d 1 (1st Cir. 1989) 7

Suppan v. DaDonna, 203 F.3d 228 (3rd Cir. 2000) 6

Toolasprashad v. Bureau of Prisons, 286 F.3d 576 (D.C. Cir. 2002) 6

Tucker v. City of Richmond, Ky., 388 F.3d 216 (6th Cir. 2004) 1

United States v. Grace, 461 U.S. 171 (1983) 3

Worrell v. Henry, 219 F.3d 1197 (10th Cir. 2000) 6

Statues

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 1

OPINIONS BELOW

The official citation to the Sixth Circuit's opinion for which review is sought is: *Tucker v. City of Richmond, Ky.*, 388 F.3d 216 (6th Cir. 2004). A petition for rehearing and for *en banc* consideration was timely filed and was denied by an unpublished order issued January 10th, 2005.

JURISDICTION

The Sixth Circuit's opinion and Judgment sought to be reviewed was entered on October 28th, 2004. A petition for rehearing and for *en banc* consideration was timely filed and was denied by an unpublished order issued January 10th, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution guarantees every citizen the right to publicly criticize public officials, and speak out about public wrongdoing, without fear of retaliation from the officials who are being criticized. The Civil Rights Act, 42 U.S.C. §1983 *et. seq.*, provides that a person may seek damages in the federal courts against any person or persons who, under color of any state or local law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

STATEMENT OF THE CASE

Beginning in the year 2000, Petitioner Gregory M. Tucker became a vocal critic of certain Richmond, Kentucky City Officials, including former Mayor and Respondent herein, Ann L. Durham. Tucker brought this civil rights case in the United States District Court for the Eastern District of Kentucky at Lexington, after the Respondents retaliated against him for handing out a series of flyers critical of local government corruption. The Defendants below (Respondents herein), included the former Mayor of the City of Richmond, Kentucky, three of its police officials, and the City. The individual Respondents filed a motion for summary judgment on grounds of qualified immunity, which was denied by the District Court in October, 2003. The Respondents immediately filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit under the collateral order doctrine. The City of Richmond also appealed on grounds of pendent jurisdiction. In an opinion entered on October 28th, 2004, a panel of the Sixth Circuit reversed, holding that the Plaintiff failed to establish a constitutional violation, because he could not show that the Respondents' actions would have *"chilled a person of ordinary firmness"* from speaking out. The Petitioner's subsequent Petition for rehearing and for rehearing *en banc* was denied by Order of the Court on January 10th, 2005.

In his Second Amended Complaint, his affidavit, his deposition, and through other evidence in the record, Tucker established that for several years during her tenure, former Richmond Mayor and Defendant Ann L. Durham, used her position and influence to divert City funds to businesses owned by Durham and her family, and that she and other officials received preferential tax treatment from local taxing authorities. Tucker discovered what he believed to be

corruption after investigating irregularities relating to a sewer project in his mother's subdivision. This led him to begin reviewing public records. Those records revealed what Tucker believed to be numerous instances of corruption and/or unfair taxation involving Mayor Durham and the other Officials. In early 2000, and based upon his findings, Tucker began publishing and distributing a series of twenty flyers in the City of Richmond and other areas of the County. These flyers were referred to in the Courts below as the "WHY" flyers. Nine of Tucker's WHY flyers specifically addressed themselves to corruption or conflicts of interest by then Mayor Ann L. Durham. (*See* "WHY", Vol. VI, VII, VIII, IX, X, XIII, XV, XVIII, and XIX). *(Appendix pp. ___)*. Another five talked about unfair tax assessments or alleged corruption by former City Manager James Ed Worley, not a party to this action.[1] Tucker also spoke out about the corruption in other ways such as filing an ethics complaint with the City, and writing letters to the editors of local newspapers. He also sent a letter to the City Ethics Board, asking two members to step down because of business relationships they had with Mayor Durham.

The record established that in response to Tucker's criticism, Mayor Durham and the City Police Department

---

[1] The Defendant/Respondents admitted in this case that Tucker's WHY flyers constituted protected speech. Furthermore, peaceful *leafletting"* is expressive free speech activity protected by the First Amendment. *United States v. Grace,* 461 U.S. 171 (1983). Streets and sidewalks are public fora for purposes of First Amendment scrutiny. *Id.* For the Appellant/Respondents to have been able to restrict the Petitioner from passing out his flyers, they would have to show that such restriction served the appropriate level of *the State's interest, and that any restriction was narrowly drawn. Id. See also, Frisby v. Schultz,* 487 U.S. 474 (1988).

began an investigation of Tucker and used the police to harass him, in an effort to stifle his criticism. Among other things, Tucker's home was placed under surveillance, he was subjected to an unlawful search at City Hall after being invited there by City Officials to review City Financial records, and Tucker was ultimately prosecuted in State Court for a "B" Misdemeanor for allegedly leaving an "obscene" flyer at the County Clerk's Office. The City Police Department's "Case Report" confirms that Tucker's WHY flyers were the reason he became a target of the investigation and harassment. *(Appendix pp. ___)*. The investigation of Tucker and two other defendants was one of the most expensive in the Police Department's history, even though Tucker was only charged with a "B" Misdemeanor. Tucker alleged and established in the District Court through both direct and circumstantial evidence, that the Respondents' bad faith investigation, harassment and prosecution, were motivated by his exposure of corruption, rather than being a legitimate police investigation. The investigation included more than a dozen City police officers, the Police Chief, three assistant chiefs and several detectives, as well as outside fingerprint experts, a "cyber expert" firm to analyze computer files, and the assignment of groups of officers to run "poster" patrols looking for Tucker and others putting out flyers. A Madison County, Kentucky jury acquitted Tucker of all charges when the case went to trial in 2002.

In September, 2002, District Judge Jennifer Coffman initially denied the Respondents' motion to dismiss Tucker's Complaint on qualified immunity grounds. It was the Respondents' subsequent motion for summary judgment on qualified immunity grounds that was denied in the District Court's 2003 opinion which was appealed to a panel of the Sixth Circuit and reversed. This Petition for Certiorari

followed the Sixth Circuit's denial of Tucker's Petition for rehearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

First, the Sixth Circuit's opinion is in conflict with that of other Circuits on the standard applicable in First Amendment retaliation questions, and this Court should resolve the split in the Circuits on this important issue. The importance of this distinction is of critical importance in First Amendment retaliation cases where Defendants seek interlocutory appeals of district court orders denying summary judgment on qualified immunity grounds, because the very right to appeal may turn on the standard applied. This is because the district court's denial of summary judgment is appealable under the collateral order doctrine as set out in *Mitchell v. Forsyth,* 472 U.S. 511 (1985), only if: (1) the Defendant is a public official asserting qualified immunity, and (2) the issue on appeal is not what facts the parties may be able to prove, but whether the Plaintiff's facts, taken at their best, show a violation of clearly established law. *Id. See also Johnson v. Jones,* 515 U.S. 304 (1995). If the Sixth Circuit had applied a subjective, fact intensive standard as do some other Circuits, then not only was appeal of the District Court's order denying summary judgment on qualified immunity grounds clearly foreclosed, but the Court would have been unable to review the District Court's findings on the injury issue. However, the Sixth Circuit panel allowed the appeal, applied an objective standard, and reversed the District Court.

Second, the Sixth Circuit's opinion conflicts with controlling Supreme Court precedent applicable to First Amendment Retaliation cases, and if left unchanged, will have a chilling effect on citizen's willingness to speak out about official misconduct.

1. Conflict Among the Circuits

In its opinion, the Sixth Circuit panel identified three elements required to establish a First Amendment Retaliation claim: *"(1) the plaintiff is engaged in protected conduct; (2) an adverse action was taken against the Plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two - that is, the adverse action was motivated at least in part by the plaintiff's protected conduct."* The objective injury standard set out in element two was previously applied by the Sixth Circuit *en banc* in *Bell v. Blatter,* 175 F.3d 378 (6th Cir. 1999). Rulings from other Circuits where the objective standard injury was applied include: *Toolasprashad v. Bureau of Prisons,* 286 F.3d 576 (D.C. Cir. 2002)*(prisoner suit); Suppan v. DaDonna,* 203 F.3d 228 (3rd Cir. 2000)*(employment context); Keenan v. Tejeda,* 290 F.3d 252 (5th Cir. 2002)*; Izen v. Catalina,* 382 F.3d 566 (5th Cir. 2004)*; Coady v. Steil,* 187 F.3d 727 (7th Cir. 1999)*(employment context); Mendocino Environmental Center v. Mendocino County,* 192 F.3d 1283 (9th Cir. 1999)*; Carroll v. Pfeffer,* 262 F.3d 847 (8th Cir. 2001)*; Worrell v. Henry,* 219 F.3d 1197 (10th Cir. 2000)*; Mimics v. Village of Angel Fire* No. 03-2214 (10th Cir. 2005)*(private citizen-public official).*

Unlike the Circuits above, three Circuits apply a subjective injury standard, and look to see whether the Plaintiff himself was deterred by the protected conduct. For example, the Fourth Circuit applies the following three element proof requirement in First Amendment retaliation claims. First, the plaintiff must demonstrate that his or her speech was protected; second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech; and

third, the plaintiff must demonstrate that a causal relationship exists between its speech and the defendant's retaliatory action. *Suarez Corp. Industries v. McGraw,* 202 F.3d 676 (4th Cir. 2000)*; See also Eden v. Kennedy,* 03-2108, 2004.C04.0001935 (4th Cir. 2004), *unpublished.* Elements one and three are essentially the same as the standard applied by the Sixth Circuit. However, element two is a subjective, and as noted by the *Suarez* Court, *"a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts."* In the Second Circuit, in a line of cases involving criticism of public officials by private citizens, the Court also applies the subjective actual chill requirement for First Amendment retaliation claims. *See Spear v. Town of West Hartford,* 954 F.2d 63, 68 (2d Cir. 1992)*; Colombo v. Connell,* 310 F.3d 115, 117 (2d Cir. 2002)*; Curley v. Town of Suffern,* 268 F.3d 65, 72-73 (2d Cir. 2001)*; Connell v. Signoracci,* 153 F.3d 74, 79 (2d Cir. 1998). However, in prisoner retaliation cases, the Second Circuit applied the objective injury test. *E.g. Davis v. Goord,* 320 F.3d 346, 353 (2d Cir. 2003), *superseded by* 2003 U.S. App. LEXIS 13030 (2d Cir. Feb. 10, 2003). *See also, Gill v. Pidlypchak,* 03-0232, 2004.C02.0001249 (2d Cir. 2004). Likewise, the First Circuit applies a subjective standard. *See e.g., Sullivan v. Carrick,* 888 F.2d 1 (1st Cir. 1989)*(to show a First Amendment violation, Plaintiff must allege that his speech was in fact chilled).*

This distinction in the injury standard applied was critical to the Respondents' right to appeal the District Court's interlocutory ruling under the collateral order doctrine, because the Sixth Circuit had jurisdiction to review the District Court's denial of summary judgment on qualified immunity grounds, only to the extent that the District Court's decision turned on an issue of law. It was without jurisdiction

to review on interlocutory appeal, the district court's determination that genuine issues of fact exist for trial. *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Johnson v. Jones,* 515 U.S. 304 (1995). Thus by applying an objective, rather than a subjective injury standard in this retaliation case, the Sixth Circuit heard and decided what other Circuits, such as the Fourth, Second, and First, would consider a non-appealable issue, the District Court's denial of summary judgment on qualified immunity grounds, based on the existence of disputed material facts surrounding whether or not the Plaintiff's speech was affected.

2. Conflict With Supreme Court Decisions

Aside from the injury standard it used in this retaliation case, the Sixth Circuit panel decision was in conflict with Supreme Court precedent in the following ways: First, it decided a non-appealable issue over which it did not have jurisdiction. Specifically, in its Order denying summary judgment on qualified immunity grounds, the District Court explicitly stated that genuine issues of material fact existed. Second, not only did the panel not accept the District Court's findings that genuine issues of material fact existed, it also failed to accept Tucker's version of the facts as it must do in an interlocutory appeal under the collateral order doctrine, and engaged in its own fact finding, making findings that contradicted facts alleged by Tucker and as shown by the record. Third, rather than limiting itself to the precise legal issue of qualified immunity, the panel decision addressed the conceptually distinct merits of Tucker's claims.

Simply put, the panel decision in this case did what this Court has held cannot be done in an interlocutory appeal of the denial of qualified immunity. In *Johnson v. Jones,* this Court held that the Seventh Circuit erred when it *"resolved a*

fact-related dispute about the pretrial record, namely whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. The Johnson Court went on to "*... hold that the defendants cannot immediately appeal this kind of fact-related district court determination.*" Quoting at length from its earlier decision in *Mitchell v. Forsythe*, the *Johnson* Court reiterated that *"the claim of immunity is conceptually distinct from the merits of the Plaintiff's claim that his rights have been violated.... [the] appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions ....".* Thus the *"appealable issue is a purely legal one: whether the facts alleged by the plaintiff support a claim of violation of clearly established law."* Further emphasizing the appellate court's limited role in such appeals, the *Johnson* Court quoted earlier decisions holding that *"[i]t is the district court's task to determine if evidence is such that a reasonable jury could return a verdict for the nonmoving party....,* and "*Whether the defendants did the deeds alleged ... is precisely the question for trial." Citations omitted.*

As noted above, rather than defer to the District Court's finding that genuine issues of material fact precluded summary judgment, or defer to Tucker's version of the facts, the Sixth Circuit panel engaged in its own review and interpretation of the factual record, sometimes accepting the Respondents' version of the facts which are disputed by Petitioner and the record. For example, in Section I of the panel opinion, it found that *[n]o criminal charges were filed with respect to the protected flyers."* In actuality, Tucker

alleged that he was in fact indicted and prosecuted in retaliation for his protected WHY flyers, even though they were not formally mentioned in the misdemeanor Indictment.[2] Furthermore, circumstantial evidence showed that the investigation also focused on the Plaintiff's protected WHY flyers, and some of the Defendants admitted as much in their depositions and other testimony. Moreover, while the opinion states that Tucker's *allegations are quite vague and generalized,"* in fact, Tucker's allegations are very specific in his Second Amended Complaint, and are set forth in great detail in his Response to the Defendants' motion for summary judgment and accompanying Affidavit, which contained at least thirty exhibits and portions of transcripts of testimony from both the parties' Depositions and Tucker's criminal trial.

Among "seven" alleged acts which the Sixth Circuit opinion states that Tucker complains, were "patrols" in Tucker's neighborhood. Yet the record shows that these were not just patrols, but the Respondents had Tucker and his home under surveillance, in part to intimidate him. Number three of the allegations listed by the Sixth Circuit opinion is that Tucker's college professors were interviewed by the police so they could *"learn more about him"*. Tucker alleged and the record showed that interviewing Tucker's professors was just another form of intimidation the police department directed at Tucker. Interviewing Officers even told some of Tucker's

---

[2] The same section of the opinion, in reference to the second series of flyers that came out, states that *"[i]t is undisputed that these flyers are not constitutionally protected."* In fact, it is the Petitioner's position that, although he was not responsible for them, these flyers may have also been protected, and he so states in Footnote 6 on Page 11 of his Brief below, citing *Hustler Magazine v. Jerry Falwell,* 485 U.S. 46 (1988).

professors that they were investigating him for a "hate crime", something that he was never charged with.

The Sixth Circuit's opinion correctly states the appropriate test for qualified immunity to wit:

The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; the second inquiry is whether the right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and ... third ..., whether the Plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights".

However, application of the first and third inquiries are clearly constrained by the rules applicable to interlocutory appeals. Therefore, the Appellate Courts have jurisdiction only to review issues of law, not the District Courts' determination that genuine issues of fact exist. Thus the first and third inquiry are limited to review on appeal in cases where either a plaintiff appeals a district court's summary judgment in favor of defendants on grounds of qualified immunity, or when the defendant appeals a district court order denying summary judgment on the basis of qualified immunity strictly on legal grounds. Because the District Judge in this case based her order denying summary judgment on grounds that genuine issues of material fact existed for trial, the panel opinion violated this Court's precedent that says that interlocutory review of facts surrounding the qualified immunity question is clearly inappropriate.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted, the Court should resolve the split in the Circuits on this important First Amendment Retaliation case, and reverse the Sixth Circuits decision which was inconsistent with this Court's precedent.

Respectfully Submitted,

Michael Dean
Counsel of Record
Law Offices of Michael Dean
227 Main Street
Irvine, KY 40336
(606) 723-4000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-6336
[Filed January 10, 2005]

GREGORY TUCKER,
Plaintiff-Appellee,

v.

CITY OF RICHMOND, KENTUCKY, ET AL.,
Defendants-Appellants.

BEFORE: KEITH, MARTIN, and ROGERS, Circuit Judges.

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original pane.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-6336
[Filed October 28, 2004]

GREGORY TUCKER, Plaintiff-Appellee,	)
v.	)
CITY OF RICHMOND, KENTUCKY; ANN DURHAM, Mayor, in her individual capacity; SAM MANLEY, in his individual capacity; CHARLES DEBORD, in his individual capacity; KENNETH CALDWELL, in his individual capacity, Defendants-Appellants.	)

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington
No. 02-00064
Jennifer B. Coffman, District Judge

Before: KEITH, MARTIN, and ROGERS, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Gregory Tucker filed claims pursuant to 42 U.S.C. § 1983 against the City of Richmond, Kentucky, and against the following City officials and employees: Mayor Ann Durham, Police Chief Charles DeBord, Assistant Police Chief Kenneth Caldwell and Police Officer Sam Manley. (Although there is some discrepancy in the briefs and the joint appendix regarding the correct spelling of Chief DeBord's name, we have adopted the spelling used in the defendants' appellate brief.) Tucker alleged that the individual defendants unconstitutionally retaliated against him for exercising his First Amendment rights and that the City maintained an unconstitutional policy of retaliating against those who criticize City officials. The individual defendants appeal the district court's ruling that they are not entitled to qualified immunity. Additionally, the City purports to appeal the district court's denial of its motion to dismiss and/or for summary judgment, though Tucker maintains that this Court lacks jurisdiction over the City's appeal. For the reasons that follow, we hold that the individual defendants are entitled to qualified immunity because Tucker has failed to demonstrate a constitutional violation. We also exercise pendent jurisdiction over the City's appeal and hold that the City is entitled to judgment as a matter of law. We therefore VACATE the district court's judgment and REMAND with instructions to award judgment in favor of all defendants.

I.

Tucker was a vocal critic of various public officials in the City of Richmond, Kentucky. Some of his criticisms were reflected in flyers that he distributed across the City alleging that certain public officials, including Mayor Ann Durham,

had engaged in various forms of official misconduct. All defendants have conceded that these flyers constitute protected speech under the First Amendment. Tucker began distributing these constitutionally-protected flyers in March or April of 2000, but there is some dispute as to when he stopped distributing them. Tucker stated in his deposition that he distributed the flyers until the fall of 2001, but he indicated in a later affidavit submitted in opposition to the defendants' motion for summary judgment that he actually stopped distributing the flyers earlier, in the late fall or early winter of 2000. No criminal charges were filed with respect to the protected flyers.

Beginning in April or May of 2000, a second series of flyers appeared across the City of Richmond. Unlike the protected flyers, which charged official misconduct, these flyers accused certain City officials of "private immorality, such as drug abuse, adultery, or pedophilia." It is undisputed that these flyers are not constitutionally protected; in fact, a criminal investigation was launched as soon as the first of these flyers appeared. The distribution of the unprotected flyers ceased in April 2001. On May 10, 2001, Tucker and two of his associates, James "Crazy Snake" Blake and Steven M. Womack, were indicted on charges stemming from their involvement in distributing these flyers. While Blake and Womack were found guilty, Tucker was ultimately acquitted.

Tucker alleges that he was subjected to harassment and retaliation by the individual defendants as a result of his distribution of the constitutionally-protected flyers concerning official misconduct and corruption. Although his allegations are quite vague and generalized, it appears that there are seven particular alleged actions by the individual defendants about which he complains:

(1) police officers conducted "poster patrols" throughout the Richmond area searching for individuals putting up posters, and Tucker was named as a suspect in connection with those patrols;

(2) police officers conducted patrols throughout the subdivision in which Tucker lived;

(3) Assistant Police Chief Caldwell interviewed some of Tucker's college professors in an effort to gain more information about him;

(4) Officer Manley forcibly searched Tucker and threatened him with arrest on one occasion as he entered City Hall;

(5) Officer Manley directed Officer Teresa Culton to go to the Madison County Clerk's office to investigate how a member of the public would go about gaining access to public tax records;

(6) during a speech in a City Commission meeting, Mayor Durham mentioned Tucker's name, among others, saying that "we should never have to be insulted or threatened by the Kay Joneses, the Steve Womacks, the Jim Blakes, the Greg Tuckers, the Dwayne Roadens of this World . . . .";

(7) following Tucker's filing of an ethics complaint over what he perceived to be improper conduct by City officials, the City adopted an ordinance that requires a party who files a frivolous ethics complaint to pay the attorneys' fees of the accused

official, and Mayor Durham voted for this ordinance.

Tucker alleges, and Police Chief DeBord concedes, that by virtue of his position, Chief DeBord is responsible for all of the police activity about which Tucker complains. It is also alleged that Mayor Durham, in addition to making a comment about Tucker and voting for the ordinance, personally ordered or authorized at least some aspects of the police investigation.

The individual defendants and the City collectively filed a motion to dismiss or, in the alternative, for summary judgment. The individual defendants argued that they were entitled to qualified immunity, and the City argued that Tucker had failed to allege a municipal custom or policy that caused a deprivation of a constitutional right. The district court denied the motion in its entirety, ruling that the individual defendants were not entitled to qualified immunity and that the City was not entitled to dismissal. This interlocutory appeal followed.

II.

A. INDIVIDUAL DEFENDANTS' APPEAL

The sole question presented in the individual defendants' interlocutory appeal is whether the district court erred in ruling that they were not entitled to qualified immunity. We review de novo the district court's denial of a defendant's motion for summary judgment on qualified immunity grounds. *Vakilian v. Shaw*, 335 F.3d 509, 515 (6th Cir. 2003). The doctrine of qualified immunity protects government officials who perform discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). In determining whether qualified immunity is warranted, we employ a three-part test:

> The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is "whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights."

Higgason v. Stephens, 288 F.3d 868, 876 (6th Cir. 2002) (citing *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (*en banc*)).

The first step in the qualified immunity analysis involves a determination of whether Tucker has shown a violation of a constitutionally-protected right. Assuming that "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) . "If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense." *Id.* at 205. Given that qualified immunity is an affirmative defense, "the defendants bear the burden of

showing that the challenged act was objectively reasonable in light of the law existing at that time." *Harlow*, 457 U.S. at 815.

Tucker alleges that the individual defendants unconstitutionally retaliated against him for distributing the flyers alleging official corruption, which were protected under the First Amendment. The elements of a First Amendment retaliation claim are as follows:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two - that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (*en banc*).

Although the defendants concede that the first element of the test is satisfied with respect to each of Tucker's claims, they maintain that the second and/or third elements are lacking. With regard to the second element, this Circuit - unlike some others - has held that "the relevant question is whether the defendants' actions are '*capable* of deterring a person of ordinary firmness;' there is no requirement that the plaintiff show actual deterrence." *Bell v. Johnson*, 308 F.3d 594, 606 (6th Cir. 2002) (quoting *Thaddeus-X*, 175 F.3d at 398). To satisfy the third element, the plaintiff must

> proffer evidence sufficient to raise the inference that his or her protected activity was a motivating factor for the adverse decision. Circumstantial evidence, like

> the timing of events or the disparate treatment of similar individuals, may support this inference. Once a plaintiff has met his or her burden of establishing that his or her protected conduct was a motivating factor behind the adverse conduct, the burden of production shifts to the defendant. If the defendant can demonstrate that it would have taken the same action in the absence of the protected activity, it has met its burden and is entitled to summary judgment if it can show affirmatively that there is no genuine issue in dispute.

Arnett v. Myers, 281 F.3d 552, 560-61 (6th Cir. 2002) (citations and internal quotation marks omitted). "Summary judgment for the defendant is proper only if the evidence is such that every reasonable juror would conclude that the defendant met its burden of showing that it would have taken the same action even in the absence of the protected conduct." *Id.* at 561 (citation omitted).

Because Tucker alleges that each individual defendant engaged in different acts of wrongdoing, we must analyze the claims against each individual defendant separately.

1. Officer Sam Manley

Tucker's section 1983 claim against Officer Manley is premised upon two allegations: first, that Officer Manley forcibly searched and threatened him as he entered City Hall one day to inspect public records; and second, that Officer Manley directed Officer Teresa Culton to research how a member of the public would go about accessing public tax records. Each allegation is addressed in turn.

a. The Search at City Hall

Although Tucker's appellate brief describes Officer Manley's conduct in as egregious a manner as possible, his deposition paints a far more benign picture of the incident:

> [Officer Manley] said he needed to talk to me over there pointing at the hallway away from the receptionist desk. I asked him in reference to what. He said, I need to search you. I asked him why he needed to search me and he said he just had to. I asked him search me for what and he said for weapons I believe it was . . . . I asked him what his probable cause was and he didn't say anything from that point on. I asked him if I refuse the search what will he do, you know, what if I refuse I believe is what I said and he didn't say anything. So I just stood there for a few moments and he stood there. I asked him, you know, I don't want to be searched I believe it was and that's when he said we're going to have to go over here and I said what if I refuse and he said, I'll throw your ass in jail.

When asked what happened after this "conversation" took place, Tucker stated:

> He searched me . . . . He requested me to place my hands against the wall, spread my legs and he took the wand and went over me and then patted me down and that was about the extent. I guess maybe it lasted a minute or two minutes.

Tucker's own version of events fails to establish a constitutional violation. Tucker has failed to satisfy the second element of a First Amendment retaliation claim because

Officer Manley's conduct does not rise to the level of adverse action that is capable of deterring a person of ordinary firmness from continuing to engage in the protected conduct. Individuals entering a government building such as City Hall necessarily encounter a variety of security measures, including the possibility that they might be searched, and the particular screening that Tucker underwent was not particularly intrusive. The fact that Tucker was searched for weapons, even if he observed no other individuals being searched at that time, simply would not deter a person of ordinary firmness in his position from continuing to distribute the protected flyers. Nor would Officer Manley's comment about throwing Tucker's "ass in jail" have such an effect; Tucker's deposition testimony reveals that this comment was offered only as a response to Tucker's inquiry about what would happen if he disobeyed Officer Manley's instruction to move out of the immediate security entrance area for further screening - and only after Tucker initially resisted being searched.

Tucker has also failed to satisfy the third element because there is simply no evidence that Officer Manley's conduct was motivated in any way by Tucker's distribution of the protected flyers. Moreover, Officer Manley has satisfactorily "demonstrated that [he] would have taken the same action in the absence of the protected activity. . . ." *Arnett*, 281 F.3d at 561. The undisputed evidence indicates that security at City Hall was at a heightened level on the day of Tucker's visit because of an incident that occurred a few days earlier in which a projectile - thought to be a bullet - punctured a window in the Mayor's office.

Under these circumstances, Officer Manley's conduct in searching Tucker as he entered City Hall did not violate Tucker's constitutional rights and his actions were

"objectively reasonable in light of the law existing at that time." *Harlow*, 457 U.S. at 815. Therefore, Officer Manley is entitled to qualified immunity in connection with his search of Tucker at City Hall.

b. Tax Records Research

One of Tucker's protected flyers concerned the issue of unfair tax assessments. The flyer stated that information about tax assessments "can be examined in the Madison County Deed Vault Room and Madison County Property Tax Assessment Office." Tucker alleges that in response to this flyer, Officer Manley instructed another police officer, Teresa Culton, to go to City Hall to research "what a citizen would need to do in order to come in and to see a tax bill." Neither Officer Culton's research nor Officer Manley's alleged instruction constitutes an adverse action that is capable of deterring the protected activity. It is unclear how this assignment could have had any adverse effect on Tucker whatsoever. Therefore, Officer Manley is also entitled to qualified immunity for his alleged role in instructing Officer Culton to investigate tax records at City Hall.

2. Assistant Police Chief Caldwell

Tucker's claim against Assistant Police Chief Caldwell is based upon events that occurred on the campus of Eastern Kentucky University, where Tucker was a student. In particular, Tucker complains about the fact that Officer Caldwell interviewed some of Tucker's college professors and asked questions about him. According to Tucker, these interviews were conducted in retaliation for his distribution of the protected flyers. We disagree. The evidence unequivocally shows that Officer Caldwell's investigation at the University,

including his interviews of Tucker's professors, were motivated by the appearance of an*unprotected* flyer on campus. For example, the chief of the University's public safety department called the police when the unprotected flyer was discovered and requested that a police investigation be undertaken into the matter. Officer Caldwell responded to this call. He went to the University building in which the flyer was discovered, attempted to locate witnesses and met with the chief of public safety. Additionally, after discovering that Tucker took classes in that building, Officer Caldwell testified that he decided to interview some of his professors, along with "other people in the . . . building[,]" in an attempt to locate "a witness that may have seen [Tucker] or others posting this flyer" and to determine if he "had any beef" with the subject of the flyer (in this case, a senator).

Officer Caldwell's actions were part of a legitimate police investigation into the unprotected flyers, which resulted in Tucker's indictment and criminal prosecution. Although Tucker baldly asserts that Officer Caldwell's true motivation was a desire to retaliate against Tucker for distributing the protected flyers, that assertion is unsupported by the evidence. Tucker alleges that the investigative file for the unprotected flyers referred to and contained copies of his protected flyers, but this fact, even if true, would not lead a reasonable juror to conclude that the police investigation into Tucker was motivated by his protected activities. It makes sense that a criminal investigation into the distribution of illegal flyers might include references to other flyers - even if legal - that may have come from the same source. In short, because Tucker has failed to satisfy the third element of a First Amendment retaliation claim, Officer Caldwell is entitled to qualified immunity with respect to the investigation that he conducted at the University.

3. Police Chief Charles DeBord

Tucker alleges that Police Chief DeBord authorized Officer Caldwell's interviews of Tucker's college professors, Officer Manley's search of Tucker and Officer Manley's direction to Officer Culton to investigate tax records at the Madison County Clerk's office, as well as the so-called "poster patrols" and the patrols of Tucker's subdivision. According to Tucker, Chief DeBord's involvement in each of these incidents renders him liable for retaliation in violation of the First Amendment. With respect to the first three alleged incidents, we have already determined that no constitutional violation has occurred. Therefore, Chief DeBord is entitled to qualified immunity for his alleged role in these incidents. The question remains, however, whether Chief DeBord is entitled to qualified immunity in connection with his authorization of the poster patrols and the patrols of Tucker's subdivision.

As to these allegations, Tucker has failed to establish a constitutional violation because, again, the third element of the First Amendment retaliation standard is lacking. The evidence indicates that the patrols in question were conducted as part of the police investigation into the unprotected flyers, not the protected flyers. Tucker finds it particularly relevant that his subdivision, which the police allegedly patrolled, was located outside of the city limits. In the absence of any evidence indicating that the police are not entitled to patrol beyond city limits, however, we attach little significance to this fact. Because neither the poster patrols nor the patrols of Tucker's subdivision violated Tucker's First Amendment rights, Chief DeBord is entitled to qualified immunity for his role in sanctioning the patrols.

4. Mayor Ann Durham

Tucker's allegations against Mayor Durham are as follows: (1) she personally authorized some of the investigatory actions taken by the police; (2) during a speech in a City Commission meeting, she mentioned Tucker's name, among others, saying that "we should never have to be insulted or threatened by the Kay Joneses, the Steve Womacks, the Jim Blakes, the Greg Tuckers, the Dwayne Roadens of this World . . . ."; and (3) following Tucker's filing of an ethics complaint over what he perceived to be improper conduct by City officials, Mayor Durham voted for, and the City adopted, an ordinance that requires a party who files a frivolous ethics complaint to pay the attorneys' fees of the accused official.

With regard to the first allegation, we have already held that none of the police activities complained of rose to the level of a constitutional violation. Therefore, Mayor Durham cannot be held liable for her role in authorizing any of the activities.

Mayor Durham's comment about Tucker, which apparently was made in response to some of the protected flyers' allegations of public corruption, does not constitute an adverse action that is capable of the requisite chilling effect. The comment merely indicated Mayor Durham's view that "we should never have to be insulted or threatened" by people who make allegations such as Tucker made in the protected flyers. It conveyed no threat and simply could not have deterred Tucker or anyone else from engaging inconstitutionally-protected speech. Therefore, Mayor Durham is entitled to qualified immunity for this comment.

Finally, Mayor Durham is entitled to absolute immunity with regard to her vote on the ordinance providing that a party who files a frivolous lawsuit ethics complaint must pay attorneys' fees to the accused official. "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 140 L. Ed. 2d 79, 118 S. Ct. 966 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, 95 L. Ed. 1019, 71 S. Ct. 783 (1951)). Absolute immunity extends to local mayors who are acting in official "legislative capacity," and passing an ordinance is an example of an action taken in official legislative capacity. *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989).

B. CITY'S APPEAL

As discussed, Tucker has also filed a section 1983 claim against the City, alleging that the City maintained an unconstitutional policy of retaliating against individuals who criticized City officials. The City purports to appeal the district court's denial of its motion to dismiss this claim or, in the alternative, for summary judgment. It is undisputed that the City's appeal is not appealable as a collateral order, but the City urges us to exercise pendent jurisdiction over its appeal. The exercise of pendent jurisdiction, while discretionary, is appropriate "where the appealable and non-appealable issues are 'inextricably intertwined.'" *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1996). The City's appeal is inextricably intertwined with the individual defendants' interlocutory appeal because there can be no municipal liability under section 1983 for maintaining a policy of unconstitutionally retaliating against individuals who exercise their First Amendment rights when no such unconstitutional retaliation has actually occurred. *See Ewolski v. City of Brunswick*, 287 F.3d 492, 516 (6th Cir. 2002)

(citations omitted)("Where, as here, a municipality's liability is alleged on the basis of the unconstitutional actions of its employees, it is necessary to show that the employees inflicted a constitutional harm."). In light of our holding that Tucker has suffered no unconstitutional retaliation, his claim against the City must fail.

III.

For these reasons, the district court's judgment is VACATED and the case is REMANDED for the entry of judgment in favor of all defendants.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CIVIL ACTION NO. 02-64-JBC
[Filed: October 8, 2003]

GREGORY TUCKER, ET AL.,)
PLAINTIFFS,)
)
v.)
)
COMMONWEALTH OF KENTUCKY,)
ET AL.,)
DEFENDANTS.)

ORDER

This matter is before the court upon the defendant's motion for summary judgment (DE 56). As genuine issues of material fact remain in dispute, including, but not limited to, whether the alleged harassing conduct would deter a person of ordinary firmness from continuing to engage in protected conduct and whether the alleged adverse action by the defendants was motivated by protected conduct, the court will deny the motion.

The defendants allege that the plaintiff cannot prove that nay conduct by the defendants chilled his speech or that the

defendant's alleged retaliatory conduct was motivated by the plaintiff's protected action and that the defendants are entitled to qualified immunity. However, the applicable standard is not whether the plaintiff's speech was actually chilled, but rather whether a person of ordinary firmness would have been deterred. *Bell v. Johnson*, 308 F.3d 594, 606-8 (6th Cir. 2002). Further, the plaintiff has alleged facts sufficient to create a dispute as to whether the defendants knew that he was responsible for the WHY flyers and whether the plaintiff's protected conduct motivated the defendants' alleged retaliatory acts. Finally, as this court held in its order of September 4, 2002, the defendants are not entitled to a defense of qualified immunity. Viewing the evidence in the light most favorable to the plaintiff, he has presented genuine issues of material fact sufficient to defeat the defendants' motion. *Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment (DE 56) is DENIED.

Signed on October 8, 2003.

(Seal) /s/_____

Jennifer B Coffman, Judge
U.S. District Court
Eastern District of Kentucky

APPENDIX D

RICHMOND POLICE DEPARTMENT
CASE REPORT

HARASSING COMMUNICATIONS

On July 22, 1996, the City of Richmond began a project to demolish the Higgins Furniture Building on Main Street, Richmond. As part of this project, Richmond City Manager Ed Worley approached Mr. Harry Roaden regarding the purchase of his property at the corner of Third and main Streets. Mr Worley made several attempts to reach an agreeable financial arrangement with the Roaden family. The City of Richmond and the Roaden family were unable to come to terms on the purchase of this property.

On January 28, 1998, the City of Richmond filed a condemnation suit against the Roaden Family and their property. On February 18, 1998, City Manager Ed Worley gave a deposition in this suit. On February 26, 1998, Mayor Ann L. Durham gave a deposition in this suit.

On April 1, 1998, a person identifying himself as a Mr. Dwayne Roaden called Richmond City Hall and left a message for Mayor Ann L. Durham to call him at 606-271-0996. The Mayor did not return this phone call. However, a few days later a person identifying himself as Mr. Dwayne Roaden threatened the Mayor on the phone. The caller told the Mayor that he had been imprisoned and did not care to go back. He stated he would kill her and she would find herself

in a fetal position going down Main Street in the back of a dump truck.

On May 28, 1998, the City of Richmond contacted Mr. Steve Womack to begin negotiations with him regarding the purchase of his property on Linden Street.

On June 2, 1998, the person believed to be Mr. Dwayne Roaden called and left the series of five messages on the City hall answering machine (refer to tape). These messages were very offensive and had a threatening tone.

From June 2, 1998 through May 11, 2001, a number of flyers were distributed in and around Richmond, Kentucky. Those involved were Senator Ed Worley, Mayor Ann Durham and others alleging misconduct, unequal taxation and corruption. Also, during the time frame litigation proceeding were being conducted between the Roaden Family, Steve Womach and the City of Richmond.

On May 7,2000, several flyers were distributed throughout the City of Richmond. Several flyers were placed on windshield of vehicles and posted on the light poles at the First Christian Church. (See Interview Sheet of bob Herbst) the flyer is described as the "Reward" flyer and marked as Exhibit #2.

On May 11, 2000, Richmond City Manager David Evans received a fax of a flyer entitled "Reward-$1,000 cash." (See Exhibit #2) This flyer offered a reward for the return of a stolen photograph showing Mr. Ed Worley, former Circuit Judge James Chennault, Mr. Joe "Ballou," and unknown members engaged in homosexual activity. This flyer was received on the City Hall fax machine. Mr. Evans received the fax at approximately 11:24 a.m. on this date. He

instructed his secretary, Ms. Rella Evans, to run a journal report (See Exhibit #1) from the machine in an attempt to locate the originating number. The journal report did not identify the sending phone number. Mr. Evans took the suspect flyer to Mayor Ann L. Durham. The Mayor contacted Public Safety Director Mr. Charles DeBord and requested that he open an investigation to attempt to identify who had sent the offensive document. Mr. DeBord contacted Detective Doug Owens and assigned him the case. Detective Owens obtained a grand jury subpoena for the phone record to the City Hall fax machine. The subpoena was served on Ms. Diana V. Stamps of the BellSouth subpoena compliance center on May 15, 2000. Ms. Stamps...

APPENDIX E

WHY?
Volume VI of XXX

(Image: A Photocopy of Pertaining Tax Bill)

Why do some people pay less in property taxes than other people do?

WHY was the property tax assessment for this property only $500.00 for 1998? This property is located downtown City of Richmond but it's only assessed at $500.00. What's going on with property tax assessments in out community? WHY do certain Richmond politicians using their elected power and influence to lower or manipulate their property tax assessments? Can you imagine only paying $4.42 for taxes on your property, which is located in downtown Richmond?? Now that's what I call a great big break!!!

Do you wonder how many years this property has been assessed at $500.00? Why don't you make a trip down to the Richmond Courthouse and find out for yourself. You may be surprised at what you'll discover! If this assessment upsets you, I guarantee many other property tax assessments for certain Richmond politicians will upset you as well. I would suggest that you voice your concerns for equal and fair taxation for all members of our community. Listed below are a few helpful phone numbers in your quest for equality in taxation.

Kentucky Revenue Cabinet 1-502-564-4581

Office of the Attorney General/Public
Corruption Unit 1-5-2-592-5468
State Auditor Ed Hatchett
1-800-592-5378
1-800-KY-ALERT

WHY?
Volume VII of XXX

(Image: A Photocopy of Pertaining Tax Bill)

Why do some people pay less in property taxes than other people do?

$8.64 was the amount paid for the 1999 property taxes on this Laurel Street lot. Wouldn't you like to pay so little tax for your property? Is there a Constitutional Amendment that allows elected officials to have their property tax assessments at an extremely low rate? How can a lot, located in City Limits, have such a low property tax assessment? How long has this Laurel Street Lot been assessed at $1,000? Maybe 2 years, 5 years, or even longer that 10 years. Why don't you make a trip down to the Madison County Courthouse and examine the records for yourself. Could extremely low property tax assessments be a form of theft? Aren't proceeds from property taxes used for our children's education?

Are certain Richmond officials and their friends stealing valuable resources (money) from our children's education by paying low property taxes?

Are our elected officials working for us, or working for themselves?? Isn't it time for this corrupt regime to end?

WHY?
Volume VIII of XXX

APOLOGIES for this volume of WHY being so sparse. When I went to the Madison County PVA office to research, it seems that every card file that I attempted to locate for Mayor Ann Durhams's or her corporations' properties had been pulled from the appropriate location.

WHERE DID THEY GO? No one seems to know.

I'm no attorney but reflecting on my civics and social studies, this brings to light the three C's- corruption, complicity and conspiracy. Perhaps I am wrong, but you be the judge. Perhaps more taxpayer resources (money) will be expended sealing these records as well.

The Kentucky Revised Statues that you and I abide by are not written differently for our elected officials. KRS 11A.020 (attached) states in part that no public servant shall use his official position or office to obtain financial gain for himself or any members of the public servant's family; or use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large. KRS 11A.050 (attached) states the ethical standards that our public officials are bound by. Do those same ethical standards exist for our local elected officials? Ask Richmond City Hall for a copy of all elected officials' financial disclosure statements. See if Mayor Durham listed all 14 FOR-PROFIT corporations and the 6 non-profit corporations which she holds an officer's position on her financial disclosure statement.

11A.020 Public servant prohibited from certain conduct – Exception – Disclosure of personal or private interest.

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

(3) When a public servant abstains from action on an official decision in which he has or may have a personal o private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

(4) The prohibitions imposed by subsection (1)(c) of this section shall not apply to Professional Golfers' Association class A members who teach golf lessons and receive a fee or lesson charge at golf courses owned and operated by the Kentucky Department of Parks. Instruction provided by an

employee of the Commonwealth shall only be ginven while the employee is on his or her own personal time. The commissioner of the Department of Parks shall promulgate administrative regulations to establish guidelines for the process by which Professional Golfers' Association class A members are approved to teach golf lessons at Kentucky Department of Parks-owned golf courses. The exception granted by this subsection as in recognition of the benefits that will accrue to the Kentucky Department of Parks due to increased participation at sate-owned golf courses.

WHY?
Volume IX of XXX

(Image: A Photocopy of Pertaining Tax Bill)

Why do some people pay less in property taxes than other people do?

WHY is this property tax assessment only $500.00? This property is located within Richmond City limits but it's only assessed at $500.00. Where is B Street located? Wasn't B Street renamed around 30 years ago? Why does this tax receipt (picture above) still have B Street listed as the property location when B Street no longer exists? Was the last property tax assessment for this property made over 30 years ago?

WHY do certain Richmond politicians and their immediate family members have such low property tax assessments? Are these politicians using their elected or appointed power to manipulate or influence their tax assessments?

Does this type of property tax assessment upset you? If it upset you and you want equality in taxation, follow the four-step program listed below.

1) Organize- Talk with you neighbors and form action groups for "Equality in Taxation."

2) Distribute- Make copies of WHY and give them to your friends.

3) Inspect- Go to the Madison County Courthouse and inspect public documents.

4) Report- Report these and other violations to Frankfort officials.

Helpful Frankfort Numbers:

Kentucky Revenue Cabinet	1-502-564-4581
Office of the Attorney General/Public Corruption Unit	1-502-696-5468
Kentucky State Auditor	1-800-592-5378

WHY?
Volume X of XXX

(Photo of Side view of Mr. Smith's house)

WHY is this house construction cost only valued at $100,00.00? Thomas J. Smith (Commonwealth Attorney) owns this house and Ed Worley is listed as the building contractor for Mr. Smith's house. See Madison County Building Permit Number 99859 which was issued on 09/21/99. This really looks more like a $200,000.00 house, wouldn't you agree?

Didn't Thomas J. Smith (Commonwealth Attorney) refuse to convene a grand jury to investigate allegations of perjury against Ed Worley and Ann Durham in the Roaden Condemnation suit against the City of Richmond? I wonder if this house influenced Mr. Smith's decision of not convening a grand jury to investigate perjury allegations against Ed Worley? $100,000.00 for a house similar to the one in the picture is a real bargain. I wish Ed Worley would build me a house exactly like Mr. Smith's home for only $100,000.00 Next time you see Ed Worley ask him to build you a house just like Mr. Smith's home and see what he says?

Could this low construction cost for Mr. Smith's house be considered a gift or payoff from Ed Worley? Isn't there a conflict of interest for Ed Worley to build Mr. Smith a house after Mr. Smith refused to convene a grand jury to investigate Ed? Do our local government officials even know what the term "conflict of interest" means?

WHY do certain political members of our community get big breaks on their property taxes and construction permits for their property? What's going on in Richmond and Madison County?

(Photo)
(Front view of Mr. Smith's house)

WHY?
Volume XIII of XXX

(Photocopy of Advertisement of
Water System Contract Bids)

Richmond is getting new sewer lines along Duncannon Lane and Corporate Drive. Guess who gets FREE SEWER?

Ann L. Durham and Rondall Durham, owners of Golden Leaf Farms, Inc. (located on the right side of Corporate Drive). See Deed Book 456, Page 83 in the Madison County Courthouse Deed Vault Room.

Take a trip out to Corporate Drive-past the "No Trespassing" sign that is posted on a City of Richmond public road. Corporate Drive is located on the right side of the RAPT factory, which is located in the City of Richmond Industrial Park.

Kentucky Revised Statue 61.190 states, "*Any public officer who shall receive, directly or indirectly, any interest, profits, or perquisites arising from the use or loan of public funds in his hands, or to be raised through his agency, shall be guilty of a Class D felony. The judgment of conviction, shall recite that the offender is disqualified to hold any public office thereafter.*"

Is Ann L. Durham Guilty of a Class D Felony?

WHY?
Volume XV of XXX

Rumors circulating around Richmond say that Richmond Mayor, Ann L. Durham, has had the Richmond Police Department patrolling the street for people distributing the WHY flier.

According to the rumor, Richmond Police officers have been ordered to conduct midnight patrols (Poster Patrol) on the weekends and possibly through the week in the hopes of catching the responsible parties. If this rumor is true, it brings about many ethical and possible legal violations concerning

the Mayor of Richmond's elected power and her actions while in office.

Isn't the main purpose of the police to protect its citizens? IS anyone really being harmed by the distribution of WHY? The Mayor may argue that her reputation is being destroyed by libel (written broadcast of defamation) but the only defense to the Intentional Tort of Defamation is the "truth." Would Ann L. Durham really like to have a three or four-week discovery process in a civil suit? Everything in WHY has been researched and documented to the highest degree possible and I'm sorry to say Dear Mayor, "It's the truth." Perhaps a little legal instruction in the Constitution of the United States with primary emphasis on the First Amendment would help our Mayor to better understand the law of our country.

Citizens of Richmond must ask themselves, "Do I really want my tax dollars spent on the Richmond p0olice department looking for fliers of WHY?" Wouldn't tax dollars be better spent on addressing the issues of drugs, violent crime, and protecting all citizens rather than a select few? The Richmond Police Department is comprised of many outstanding police officers dedicated to protecting us but it seems that the Mayor of Richmond may have overstepped her boundaries.

Perhaps an open record request for police budgets at City Hall would validate the rumor of "Poster Patrol." WHY is informing the public about how the Richmond Royalty are getting a free ride on the dollars that you, the taxpayer, give them.

Helpful Numbers:
Kentucky Revenue Cabinet/

Property Taxes	1-502-564-4581
Alber.Baker@mail.state.ky.ud	
Office of the Attorney General/	
Public Corruption Unit	1-502-696-5468
attorney.general@law.state.ky.us	
Kentucky State Auditor	1-800-592-5378
alert@kyauditor.net	
Office of the Attorney General/	
Special Prosecutions Division	1-502-696-5337
attorney.general@law.state.ky.us	

WHY?
Volume XVIII of XXX

(Image: A Photocopy of Pertaining Tax Bill)

Why do some people pay less in property taxes than others do?

Do you remember volume XVII of WHY? That issue reported the City of Richmond paying $1,171,055.00 to Peggy Arnett Rice for property located on Duncannon Lane in 1995. Golden Leaf Farms, Inc. owns 179.83 acres of land, which is located next to the same property for $1,171,055.00.

Why is Golden Leaf Farms, Inc's property tax assessment only $107,000.00? Why is this property tax assessment so little considering its location, which is adjacent to the City of Richmond's 1995 purchase? What factors contribute to the Golden Leaf Farms, Inc's property tax assessment being so small?

Golden Leaf Farms, Inc. Is a Kentucky Corporation, which lists Rondall Durham as the President. Isn't Rondall

Durham the husband of Richmond Mayor Ann L. Durham? Why is Golden Leaf Farms, Inc. getting city sewer and water services ran to its property with the Department of Housing and Urban Development picking up the tab? Isn't this a violation of the Code of Federal Regulations, "CONFLICT OF INTEREST," Title 24, Section 85.36 and Section 570.611 (b)? Is this an example of a City of Richmond elected official working for their own self-interest?

Why is this Richmond elected official receiving benefits with taxpayers' dollars?

Is the Mayor of Richmond also hoping to receive a HUD house in the future? Maybe not, I guess all of those property tax savings will disqualify her for the HUD home, but we all are learning how our Mayor can get around red tape and the laws we abide by.

WHY?
Volume XIX of XXX

(Photo of Richmond's New Post Office)

It's time to play, "Who wants to be a Millionaire?"

Main Street Properties is the entity which is leasing space to the US Postal Service for the new Richmond Post Office. The US Postal Service pays Edwin Luxon & Ann L. Durham (ATTY IN FACT) installments each month for a period of 20 years for this lease with *Main Street Properties*. Is this another "Conflict of Interest" for our Mayor? Would our Mayor use her elected power to influence or direct the location of the new Richmond Post Office so that it would be on her $500.00 lot?

Volume VI of WHY reported about a 1998 property tax assessment in the amount of $500.00 for downtown property, located in Richmond, KY, C/O of Ann L. Durham. Part of the new Richmond Post Office sets on this same $500.00 lot.

Question: What is the total dollar amount of rent that Main Street Properties will receive from the US Postal Service for the 20 year lease?

a) $1.00
b) $2.00
c) $3.00
d) $3,006,115.00

Just think! If you had downtown property assessed at $500.00, maybe you, too, could be a "Millionaire" with no help from Regis Philbin.